BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

MADRONA COMMUNITY, INC., and MR. & MRS. JOHN M. KIDDER, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and HAROLD A. BURKUM, Respondents.	PCHB NO. 86-65 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

THIS MATTER, the appeal of an approval by the Washington State Department of Ecology of an application to appropriate surface water for domestic use from a stream on Cypress Island, Skagit County, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, and Wick Dufford, Member, on September 23, 1986, in Mt. Vernon, Washington, and September 25, 1986, in Everett, Washington. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230. Mr. Dufford presided.

Appellants were represented by Kenneth J. Evans, Attorney at Law. Respondent Department appeared by Allen T. Miller, Jr., Assistant Attorney General. Respondent Burkum, the permit applicant, appeared pro se. Reporter Debra Rietfort recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

This matter concerns Harold A. Burkum's application to divert water from Cypress Creek to supply domestic water for two cabins to be used by members of his family. The Department of Ecology (DOE) has approved diversion at the rate of .01 cubic feet per second (c.f.s.), limited quantitatively to .5 acre feet per year. No diversion would be allowed during the months June through October.

Burkum's proposed use is opposed by property owners downstream who fear interference with their water supply.

II

Cypress Creek originates high in the interior of Cypress Island as the outflow of Phebe Lake (also known locally as Cypress Lake). It flows through an upland marsh (called the Stella Swamp) and then descends steep hillsides to Strawberry Bay on the west side of the island, where it enters the waters of the Rosario Straits.

Phebe Lake lies at about 1,000 feet above sea level. The Burkum's proposed point of diversion is at approximately 400 feet of elevation. About 1,000 feet downstream from this proposed diversion point is a small existing concrete dam and weir impoundment used by the Madrona Community Inc., at an elevation of about 200 feet. Two other small domestic water diversions are authorized downstream from the Madrona Community works.

III

In its upper reaches, Cypress Creek's flow passes from surface to subsurface at various points during the summer season. Below 600 feet of elevation the surface flow is generally perennial. The stream is fed from the lake and swamp and general runoff in the watershed. Additionally, it intersects groundwater outflows from springs along its route.

It is a gaining stream as it progresses toward the Madrona Community diversion. A measurement taken on August 9, 1981, at Burkum's proposed point of diversion showed a flow of .014 c.f.s. On August 10, 1981, a measurement at the Madrona Community diversion site was .1 c.f.s. -- more than seven times the flow measured at Burkum's

We find that these measurements are representative of normally expectable low flow conditions. (A USGS discharge measurement at the Madrona Community site on October 4, 1962, was .095 c.f.s.)

IV

The DOE's expert investigator was of the opinion that a diversion of .01 c.f.s. as requested at Burkum's proposed site would not be detectable at the Madrona Community's diversion point or below.

Rainfall in the watershed (perhaps 30 inches a year) occurs principally during the late fall, winter and early spring. During this period the flow of Cypress Creek is considerably greater than in the dry summer.

We find that with diversion at the rate of .01 c.f.s. at Burkum's proposed site during the rainy season no difference in the flow at present downstream turn-outs would be measureable.

V

Madrona Community Incorporated is a non-profit corporation set up by John M. Kidder to serve a 36 lot development on Strawberry Bay. At the time of hearing, there were 15 houses in use on development lots. These were served by water from the Madrona Community System for domestic uses, including installed and functioning septic tanks and drainfields.

Only three houses were occupied year around. The rest were used as recreational second homes, primarily, but not exclusively, in the summer. It is not clear from the record whether the two authorized small diversions below the Madrona Community dam and weir are actually in current use. However, the record is clear that at the present

level of development, the water supply is adequate for all the residences in use on Strawberry Bay.

VI

The Department's investigator testified that an annual water quantity of .5 acre feet per house is more than adequate for the domestic needs of the Strawberry Bay houses. If 36 houses were ultimately served, this would mean a total annual water requirement of about 18 acre feet. Withdrawal of water year around from the stream at .075 c.f.s. (less than normal low flows) would produce three times that quantity.

Burkum proposes to provide water for two cabins with his diversion. Nonetheless, the Department would impose an aggregate annual quantity limit of .5 acre feet on his diversion, cutting in half the water duty per house considered in calculating Strawberry Bay needs. We find that the quantity of water available is sufficient to allow Burkum's annual use of .5 acre feet to occur without conflict with Strawberry Bay uses, even at full development.

VII

Burkum's application was filed on June 9, 1980. DOE's field examination occurred on August 9, 10, 1981. DOE's decision on the application was rendered on February 19, 1986. Appellant sought review with this Board on April 4, 1986.

During the time the Burkum application was pending at DOE, another older application for a much larger withdrawal from Cypress Lake and

springs in the area was also under consideration. Initially the investigator did not feel that all of the water proposed for diversion from the Cypress Creek drainage by both applications could occur consistent with Strawberry Bay needs. However, the large application was cancelled at some point in 1985, and the Burkum application was reconsidered in light of the changed context.

VIII

On behalf of Madrona Community, Inc., Mr. Kidder filed a water right claim on June 4, 1974. This claim asserted a vested right dating back to at least 1914 for all the water of Cypress Creek, stating that the current level of beneficial use was diversion at the rate of .4 c.f.s.[1] The purposes of use were listed as power generation, irrigation and domestic supply for the community.

No permit or certificate under the Water Code of 1917 has been issued in connection with the uses asserted in the water right claim.

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1 Mr. Kidder has provided a chronology of historic uses of Cypress Creek. He advises that Captain George Vancouver stopped at Stawberry Bay in 1792, and that the British ship William and Anne visited there in 1830, with the Snohomish Indian Watskalatchie onboard. Mr. Kidder is a direct descendent of the uncle of Watskalatchie, a signer of the Treaty of Point Elliott in 1855. Non-Indian settlement on the Bay apparently commenced in the 1870's.

If either Indian usage (time immemorial) or Captain Vancouver's visit were the basis of the priority date for the Madrona Community, its rights would pre-date the Doctrine of Prior Appropriation, upon which its claim is based.

Moreover, no adjudication of the validity of the claim has ever occurred in Superior Court under the statutory procedure.

Accordingly, DOE was obliged to reach a tentative conclusion as to the extent of probable validity of this claim in evaluating the impact of Burkum's proposed diversion.

IX

As to the uses asserted in the water right claim, no evidence was presented at our hearing about use of Cypress Creek water for irrigation. Electric power generation was provided by a Pelton wheel for a number of years in the early part of the century, but this use ceased sometime in the World War II era and has not been reinstituted. Homes on Strawberry Bay now depend on propane gas systems to produce electricity.

There was considerable testimony about prior domestic use of the creek. Strawberry Bay was the site of fish traps used for capturing sockeye salmon in the summer and early fall from the 1890's until such traps were outlawed in 1934. In connection with the traps, a significant operation was conducted on the shore, involving several homes and cabins, a bunkhouse, cannery, netshed and dock. Most remnants of the commercial aspects of this operation were wiped out in a great fire which occurred in 1942. Since that time, use of the water has been limited to domestic uses in connection with the residences in the area. Kidder platted the Madrona Community in 1963. Subsequently, there has been a gradual growth in the number of

houses, the biggest change coming in recent years. Most, if not all, of the 36 lots have been sold.

X

DOE's approach was to consider the water right claim as tentatively valid to the extent of the potential domestic use in the Madrona Community at full development. Under the evidence of historic use provided, we find it unlikely that past domestic uses exceeded this level of development.

Moreover, we were not convinced that .4 c.f.s. is a diversion rate which has been sustained historically in connection with domestic uses. A rate of .005 c.f.s. per lot served should provide an adequate instantaneous rate. This would mean a diversion rate of .075 c.f.s. for the 15 houses now in use. For full development of 36 lots, a maximum instantaneous rate of .18 c.f.s. would be appropriate.

XI

No evidence was introduced which tended to show that Burkum's proposed diversion would have any adverse environmental impacts, either through interference with the operation of septic systems, or otherwise.

XII

There are two certificated domestic rights with points of diversion below that of the Madrona Community. One is for P.S. Cook and Estelle W. Ferguson at the rate of. 02 c.f.s. and the other is for

John Kidder at the rate of .01 c.f.s. Both have priority dates in 1962. If these rights are in use at the points of diversion authorized, we find that Burkum's diversion as limited will not interfere with them. His diversion would not conflict with withdrawal rates or with the appropriate quantities dictated by beneficial use.

XIII

Burkum is, in effect, being authorized to acquire a "flood right" by DOE. In light of the limitation as to the authorized season of withdrawal, he will have to consider construction of off-stream storage to permit year-around use of his cabins.

Likewise, in light of the natural low flow conditions, the Madrona Community may have to create storage to facilitate year-around water availability at full development. This possible need of the Community, however, will not be caused by Burkum's rainy season diversion.

XIV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and these matters. Chapter 43.21B RCW.

II

Appellants assert a failure to comply with the State Environmental Policy Act (SEPA), chapter 43.21C RCW. The appropriation in question is categorically exempt from threshold determination and environmental impact statement requirements pursuant to WAC 197-11-800(4)(b), and, therefore, there was no violation of the procedural requirements of SEPA.

Moreover, no violation of substantive requirements of SEPA was made out. No evidence was presented concerning adverse environmental impacts likely to flow from the proposed domestic water diversion.

III

Appellants assert that DOE's approval in 1986 was improper because its field investigation was conducted in 1981.

Under RCW 90.03.290 DOE is required to investigate each application in order to determine the relevant facts. On review before this Board, the agency's decision must stand or fall on the facts presented at our de novo hearing. Therefore, the passage of time between the field examination and the agency decision has no legal significance in and of itself.

Through the hearing in this case, we were not advised of facts undiscovered by DOE in its investigation which would render the decision the agency later reached erroneous. We conclude there was nothing unlawful in the decision-making process performed by the agency.

IV

At hearing a ruling was reserved on the admission of several exhibits relating to the internal deliberations of DOE on this application. DOE argued that the material is privileged as a part of the agency "mental process." This privilege, though recognized by our courts, Hafermehl v. University of Washington, 29 Wn.App. 366, 628 P.2d 846 (1981), may like other privileges be waived. We conclude that a waiver occurred during the course of these proceedings and, therefore, have admitted and considered the proferred exhibits. Nonetheless, we were not pursuaded as a result of this consideration that the agency decision ultimately made rests upon an inaccurate factual basis.

V

The Surface Water Code of 1917 requires that DOE make four determinations prior to the approval of an application to appropriate water:

(1) what water, if any, is available

(2) to what beneficial uses is the water to be applied

(3) will the appropriation impair existing rights and

(4) will the appropriation detrimentally affect the public welfare.

Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973) RCW 90.03.290. We conclude that each of these determinations was properly made in this case.

VI

As to the first two required determinations, there is no serious contest. Water is physically present in Cypress Creek during the rainy season and the proposed domestic use is concededly a beneficial one. See RCW 90.54.020(1).

VII

Alleged impairment of existing rights is the major issue of this case. To analyze this issue, DOE must first evaluate what, if any, existing rights there may be in a watercourse. Where, as here, an asserted prior right is neither evidenced by a state-issued certificate nor judicially adjudicated, the agency must necessarily make a "tentative" determination of its validity. Funk v. Bartholet, 157 Wash 584, 289 Pac. 1018 (1930).

The filing of a water right claim under chapter 90.14 RCW merely avoids the statutory relinquishment attending failure to file under RCW 90.14.071. The claim's validity depends on proof of underlying facts demonstrating appropriation prior to enactment of the 1917 Code and continuous use since.

Here we have a claim to use of Cypress Creek which appears to have been initiated sufficiently early in time. But, not all of the claimed purposes of use appear to be valid. There is no record of any attempt to secure permission to change the power generation use to domestic use under RCW 90.03.380. See Department of Ecology v. Abbott, 103 Wn.2d 686, 694 P.2d 1071 (1985). The period of non-use

for power purposes should call into play the forfeiture provisions of RCW 90.14.160, 170. Further, there is no record of irrigation use.

The "tentative" validity of the claim, then, rests on the historic use of water for community domestic supply. On the evidence presented, we are convinced that the DOE's approach, treating the historic claim for domestic use as valid to the extent of full development of 36 lots, was a liberal approach.

We have found that Burkum's proposed rainy-season appropriation would not physically interfere with the full satisfaction of existing rights as tentatively determined by DOE, (nor with those smaller prior rights for which certificates have been issued). In these circumstances, we conclude that there would be no "impairment" of "existing rights" as those terms are used in the statute.

VIII

The remaining determination relates to the threat of detriment to the "public welfare," a term used synonymously in RCW 90.03.290 with "public interest." The Stempel case teaches that possible pollution impacts may violate the public interest criterion. But here, though adverse environmental effects were asserted in the pleadings, no proof of the likelihood of such effects was introduced.

Appellants did make two other assertions which relate to the public interest standard. One deals with the purported ineffectiveness of Water Code enforcement in the somewhat remote

precincts of Cypress Island. The other concerns the alleged availability of alternative sources of water for Burkum's proposed use.

Neither of these assertions provides a basis for concluding that the instant approval will be detrimental to the public interest. A member of the public who seeks to use the water resources which belong to the public, RCW 90.03.010, and who can otherwise satisfy the permit criteria of the Water Code, is not legally prevented from doing so because the state's system of administration is short of manpower. Likewise, although the public interest may dictate the use of alternate sources to avoid use conflicts, recourse to such sources is not compelled where, as here, the likelihood of conflicts has not been demonstrated.

IX

Because the appellants have not shown that approval of the subject surface water application is inconsistent with any of the statutory criteria for granting an appropriation, the approval should be affirmed.

We do not share the concern of members of the Madrona Community that this approval may be a "foot in the door" to larger upstream diversions from this source for Burkum's 80 acres. Given the limitations on year-around water availability in the upper reaches, we believe that the possibility of further development from Cypress Creek in Burkum's locale is slight. The removal of the small amount

approved in the instant case reduces, rather than enhances, the likelihood of future upstream approvals.

We suggest, though, that it would be appropriate in these circumstances for DOE to require the applicant to install a system for measuring his diversions, in accordance with the agency's power to so require under RCW 90.03.360.

X

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The approval of the Department of Ecology of the surface water application of Harold A. Burkum is affirmed, provided that the schedule for the project shall be moved forward so as to commence with the issuance of this decision.

DONE at Lacey, Washington, this 24th day of September, 1987.

POLLUTION ~~CONTROL~~ HEARINGS BOARD

9/25/87

LAWRENCE J. FAULK, Chairman

WICK DUFFORD, Member